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83-624
No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

MASHPEE TRIBE, ET AL.
PETITIONERS

v.

JAMES G. WATT, ET AL.
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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October 14, 1983

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Questions Presented

1. Did the First Circuit err, when, after a four-year interval and without reasoned opinion it summarily changed its original ground for dismissing Indian petitioners' first case (*Mashpee I*) from lack of standing to sue to failure on the merits, thereby precluding Indian petitioners' second case (*Mashpee II*)?

2. Did the First Circuit err, when, after the *Mashpee I* trial court expressly reserved but never reached the issue of tribal title because of standing dismissal, the Court of Appeals nevertheless expressly found title had been "fully litigated" and applied res judicata to *Mashpee II*?

3. Did the First Circuit err by holding, without explanation, that petitioners' suit against the Commonwealth of Massachusetts, which was not a party in the first action, was barred by res judicata?

4. Did the First Circuit err by holding, without explanation, that over 300 individual Indians whom the district court found were not represented in the first suit, were barred by res judicata from bringing their own suit?

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MASHPEE TRIBE, ET AL.
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v.

JAMES G. WATT, ET AL.*
RESPONDENTS

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the First Circuit entered in this case on May 23, 1983.

Opinions Below

The opinion of the First Circuit is reported at 707 F.2d 23 (1st Cir. 1983) and is printed as Appendix A to this petition. The opinion of the United States District Court for the District of Massachusetts is reported at 542 F.Supp. 797 (D.Mass. 1982) and is printed as Appendix B to this petition.

Jurisdiction

The decision of the First Circuit was entered on May 23, 1983. By order dated August 8, 1983, Mr. Justice Brennan

* *See* Appendix C for list of parties.

extended the time for filing this petition to and including October 20, 1983. This petition was filed within the extended time. This Court has jurisdiction under 28 U.S.C. § 1254(1) and under Sup. Ct. R. 17.

Constitutional and Statutory Provisions Involved

"The Congress shall have the power . . . to regulate Commerce . . . with the Indian Tribes." U.S. Const. Art. 1, § 8, c. 3.

"No state shall enter into any treaty. . . ." U.S. Const. Art. 1, § 10, c. 1.

"He [the President] shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties. . . ." U.S. Const. Art. II, § 2, c. 2.

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, c. 2.

"No person shall . . . be deprived of life, liberty or property, without due process of law. . . ." U.S. Const. Amend. V.

"No purchase, grant, lease, or other conveyance of land, or of any title or claim thereto, from any Indian Nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177.

Statement of the Case

This is an Indian land complaint by the Mashpee Tribe and 334 individual members of the Tribe against the United States Secretary of Interior, the local United States Attorney, various Massachusetts judicial and executive officers, a private landowner, the Commonwealth of Massachusetts and the Town of Mashpee, asking declaratory and injunctive

relief for the Tribe, its members-descendants and the Mashpee Reservation as a separate juristic person, arising out of alleged violations of the federal common law, the United States Constitution, the Nonintercourse Act (25 U.S.C. § 177) and related constitutional and statutory provisions. District Court jurisdiction was based on the Commerce and Treaty clauses of the United States Constitution; the federal common law; 5 U.S.C. § 701 et seq.; 25 U.S.C. § 177; and 28 U.S.C. §§ 1331, 1337, 1343 and 1362.

This petition seeks review of a decision of the United States Court of Appeals for the First Circuit, affirming dismissal of instant case, *Mashpee Tribe v. Watt*, 542 F.Supp. 797 (D.Mass. 1982), *aff'd*, 707 F.2d 23 (1st Cir. 1983) (*Mashpee II*), on res judicata because *Mashpee Tribe v. Town of Mashpee*, 447 F.Supp. 940 (D.Mass. 1978), *aff'd sub nom. Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979) (*Mashpee I*), dismissed for lack of standing, reached merits.

The gist of Mashpee petitioners' allegations is they have been a non-terminated politically recognized federal Indian tribe, living on their federally recognized Reservation in Massachusetts since at least 1789; that in 1842 and again in 1869, without federal consent, the Massachusetts legislature purportedly lifted the federal alienation restriction on the Mashpee Reservation and purportedly released the Mashpee Indians from federal guardianship, *see* Mass. Acts 1842, c.72; Mass. Acts 1869, c. 463; that in 1870, again without federal consent, the Massachusetts Legislature purportedly converted the Federal Tribe of Mashpee into the Massachusetts Town of Mashpee, purportedly transferred all the Tribe's powers and assets to said Town, including the Tribe's commons in land, funds, fishing, hunting, trapping, water, beaches, shores, wood, pasture, burial grounds and the like, *see* Mass. Acts 1870, c. 293; that said 1870 legislation also purportedly empowered the Barnstable County Probate

Court to allot or sell the Tribe's common lands; that under color of said void legislation, various state, county and local officials and various private persons have acted in derogation of said Mashpee Tribe, the said Mashpee Indian status, the said Mashpee Reservation, and the said members-descendants' commons therein; that said unauthorized actions of Massachusetts coupled with the failure of the United States to assert its trust responsibility deprives the several plaintiffs of control over their Tribe, their status, their Reservation, their commons and their property therein in violation of federal common law, the federal Constitution and federal legislation.

Reasons for Granting the Writ

I. THE FIRST CIRCUIT'S SUMMARY CHANGE OF *MASHPEE I* DISMISSAL GROUND FROM LACK OF STANDING TO SUE TO JUDGMENT ON THE MERITS, AFTER A FOUR YEAR INTERVAL, SO TO BAR *MASHPEE II*, IS A COMPLETELY UNWARRANTED DEPARTURE FROM USUAL JUDICIAL PROCEDURE.

Petitioners bring this case here because they believe the First Circuit so far departed from the usual course of judicial proceedings, as well as having sanctioned like departure by the district court, petitioners have been deprived of fundamental procedural and substantive rights. *See* Sup.Ct.R. 17.1 (a).

Instant case, *Mashpee II*, originally filed on 18 December 1981 and drawn by District Judge Skinner, is rooted in an earlier case, *Mashpee I*, originally filed on 26 August 1976 and also drawn by Judge Skinner.

In *Mashpee I*, the parties and the court having agreed "plaintiff must establish its status as an Indian tribe," 447 F.Supp. at 943, on the date of suit, "[t]he threshold issue of tribal existence was severed for separate trial by order of the court." *Id.* Having reserved "the issue of tribal title as a

matter of law decision for the court", *Id.*, with the agreement of plaintiff's counsel Judge Skinner submitted the question of tribal existence to a jury. After 40 days of trial and confused jury findings which included a finding of no tribal existence on August 26, 1976, Judge Skinner dismissed *Mashpee I* "on the merits, the plaintiff not having established its standing to bring suit as an Indian tribe". 447 F.Supp. at 950. On February 13, 1979, noting "[i]t is undisputed that if plaintiff was not a tribe in 1976 it lacked standing to sue", 592 F.2d at 579, and finding no error in Judge Skinner's jury charge, the First Circuit affirmed.

In *Mashpee II*, Judge Skinner denied petitioners' motion to recuse, and disregarding their new assertion of matter of law standing, on June 30, 1982, found that the *Mashpee I* plaintiff *did have standing*, that "the court was empowered to determine the merits", 542 F.Supp. at 800, and that the jury had found plaintiff was not a Nonintercourse Act tribe. Accordingly Judge Skinner dismissed the *Mashpee II* tribal claim on "collateral estoppel", *Id.*, and held the individual claims being derivative also failed.

On May 23, 1983, the First Circuit in a two page unreasoned, conclusory per curiam opinion, styling *Mashpee I* as "a judgment on the merits rather than a dismissal for lack of subject matter jurisdiction" because of "the tribe's inability to prove . . . its continued tribal identity" and because title "was fairly litigated" and "the interests of the tribe and its members . . . fully and fairly represented", held *Mashpee II* "barred by . . . res judicata" and "the trial court . . . not biased."

It is interesting to note that after an exhaustive analysis of *Mashpee I* in 1979, Professor Robert N. Clinton, a lawyer and nationally recognized federal Indian law expert concluded the case had been dismissed for lack of standing to sue:

> "Indeed, the court ultimately grounded its dismissal upon the tribe's lack of 'standing', i.e., capacity to sue." Clinton & Hotopp, *Judicial Enforcement of the Federal*

Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Me.L.Rev. 17, 60 (1979).

And in a most significant exchange during a recusal hearing on 2 February 1982, just five months before he found there *was* standing in *Mashpee I*, District Judge Skinner agreed with petitioners' counsel that he had dismissed *Mashpee I* for lack of standing and had not reached merits:

> "MR. HAHN: In our view, the entire Mashpee trial before you was a most unusual circumstance, anyway, because it all related essentially to the question of standing —
>
> THE COURT: Right.
>
> MR. HAHN: --whether or not you could take hold of the case and go forward on the merits.
>
> THE COURT: Exactly.
>
> ***
>
> MR. HAHN: . . . Now, as far as we are concerned, the first Mashpee case truly stands for nothing except in the most limited sense there was a decision made that there was no standing in the plaintiff's 1976 case to bring their action.
>
> THE COURT: That's right." Tr. 15-16.

A. *The Decision Below Directly Conflicts With This Court's Holding That Dismissal For Lack Of Standing Is Not On The Merits and Does Not Bar A New Action With Cured Standing, In Its Hughes v. United States, Costello v. United States, Flast v. Cohen and Warth v. Seldin Decisions.*

As demonstrated above, both the *Mashpee I* District and Circuit courts explicitly dismissed *Mashpee I* at the "threshold" for lack of "standing". *See Mashpee I*, 592 F.2d at 579, 581, 589.

This Court clearly holds that a dismissal at the threshold for lack of standing terminates the action without reaching the merits:

> "*The rules of standing*, whether as aspects of the Art. III case-or-controversy requirement or as reflections of

> prudential considerations defining and limiting the role of the courts, *are threshold determinants of the propriety of judicial intervention.*" *Warth v. Seldin*, 422 U.S. 490, 518 (1975) (emphasis added).
>
> "Despite the complexities and uncertainties, some meaningful form can be given to the jurisdictional limitations placed on federal court power by the concept of standing. *The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.*" *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (emphasis added).

And if the standing — or "defect of parties" — problem is cured, a second action may be brought:

> "*If the first suit was dismissed for defect of* pleadings or *parties*, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, *the judgment rendered will prove no bar to another suit.*" *Hughes v. United States*, 71 U.S. (4 Wall.) 232, 237 (1866) (emphasis added), quoted in *Smith v. McNeal*, 109 U.S. 426, 430 (1883) and *Costello v. United States*, 365 U.S. 265, 286 (1961).

See also McCarney v. Ford Motor Co., 657 F.2d 230 (8th Cir. 1981).

Inasmuch as preclusion doctrines such as res judicata and collateral estoppel come into play only when there is a final judgment "on the merits", *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 (1955), such doctrines are wholly inapplicable in instant case.

B. *The Decisions Below Ignore The Fact That The Mashpee Tribe Is A Nonterminated, Politically Recognized Federal Tribe With Matter Of Law Standing.*

In *Mashpee I*, the "threshold" issue of tribal standing was submitted to a jury who were permitted to examine cultural and sociological existence. This procedure was fundamental error.

Standing, or a party's "right to sue", is an "issue triable to the court." *Ross v. Bernhard*, 396 U.S. 531, 539 (1970). And "[t]he question [ ]. . . whether the tribe is still existing. . . [is a] question of law." *Wilbur v. United States*, 281 U.S. 206, 221 (1930). *See also* Clinton & Hotopp, *supra*, 31 Me.L.Rev. at 56 n. 201, 59, 60. Thus tribal standing should *never* have been submitted to a jury.

Petitioners' basis for tribal standing is as follows:

Sovereign recognition of Indian tribes and their reservations can be inherited from a prior sovereign or come about by treaty or report or other official executive or legislative act of the current sovereign.

In petitioners' case, the Mashpee Tribe's federal recognition comes not only by inheritance from its prior sovereigns, the Massachusetts Commonwealth and the English Crown, but by inclusion in various tribal inventories, censuses and lists prepared and maintained by the executive and legislative departments of the United States. *See* App. D.

A leading Court of Claims case underscores the legal effect:

> "[I]f such. . . tribes. . . have not been recognized by treaty, but have been [recognized] by the officers of the Government whose duty it was to report in respect thereto, then the court will accept that as sufficient recognition of the tribe. . . on which to predicate a judgment." *Tully v. United States*, 32 Ct.Cl. 1, 7-8 (1896).

And it is well established the court is bound by such political recognition.

In international affairs, for example, once the executive or legislative — the political — departments of the United States have recognized a foreign sovereign, its courts are bound to do the same. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 301-303 (1918).

And so in Indian affairs, federal political recognition of an Indian tribe binds the courts. *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1866).

And such recognition continues until expressly terminated by Congress. Clinton & Hotopp, *supra*, 31 Me.L.Rev. at 67-68 and n.262.

But not only petitioners' newly asserted matter of law basis for tribal standing and supporting documentation were not discussed by the lower courts, they were completely ignored.

II. The Decision Below Directly Conflicts With Preclusion and Finality Rules Established by this Court and Followed by Other Courts.

Discussion of res judicata (claim preclusion) and collateral estoppel (issue preclusion) is difficult in this case for two reasons.

First, because both *Mashpee I* courts structured their actions and their opinions on 'threshold' and 'standing to sue', 'preclusion' should never have been even considered let alone applied in *Mashpee II*.

And second, although the *Mashpee II* district court dismissed the tribal claim on collateral estoppel, the First Circuit, without explanation, barred all *Mashpee II* claims on res judicata.[1]

To begin with, "[t]he burden of establishing preclusion is placed on the party claiming it, . . . and reasonable doubts will be resolved against an asserted preclusion." *Schneider v. Colegio Abogados de Puerto Rico*, 546 F.Supp. 1251, 1271

[1] A second action is not precluded against those not parties (or privies of parties) in the first action. *Lawlor v. National Screen Service Corp.*, *supra*, 349 U.S. at 329. Although defendant Commonwealth of Massachusetts was not a party in *Mashpee I*, and although the Commonwealth's main bases for dismissal were lack of standing and nonjusticiability, the lower courts without discussion dismissed the Commonwealth on preclusion grounds. Dismissal of the State is stranger still in light of a subsequent First Circuit case recognizing "[r]es judicata . . . only bars actions against those parties who were involved in the earlier suit." *Roy v. City of Augusta*, 712 F.2d 1517, 1521-1522 (1st Cir. 1983).

(D.P.R. 1982); *see also Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982). As this Court has stated:

> "According to Coke, an estoppel must 'be certain to every intent;' and if upon the face of the record any thing is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence." *Russell v. Place*, 94 U.S., (4 Otto.) 606, 610 (1876).

In addition, it is a basic principle of Indian law that all doubts are to be resolved in favor of the Indians. *Red Bird v. United States*, 203 U.S. 76, 94 (1906).

Again, inasmuch as *Mashpee I* was dismissed at the threshold for lack of standing, there was no final judgment on the merits to support application of res judicata or collateral estoppel.

Further, in order for collateral estoppel, or issue preclusion, to apply, the issue decided in *Mashpee I* must have been "identical in all respects" to the issue presented in *Mashpee II*. *Commissioner v. Sunnen*, 333 U.S. 591, 599-600 (1948).

As stated, using a jury in *Mashpee I* to decide the threshold issue of tribal standing was gross legal error. By contrast, instant petitioners present the Mashpees as a non-terminated, federally recognized Tribe and back up their standing allegations with federal and state documentation never considered by either court in *Mashpee I*.

Also as stated, the *Mashpee I* trial court expressly reserved the tribal title issue (*"The issue of tribal title was reserved as a matter of law decision for the court"* 447 F.Supp. at 943), which because of dismissal for lack of standing was never reached. Nevertheless the First Circuit in *Mashpee II*, noting that title was the core issue flatly stated title *"was fairly litigated"* and applied res judicata.

Finally, instant case involves more land, additional parties and new legal theories not presented in *Mashpee I*. For example, while the *Mashpee I* plaintiff relied solely on the

Nonintercourse Act (25 U.S.C. § 177), instant petitioners base their claims primarily on the federal Indian common law as an incident of national sovereignty and as incorporated in the commerce and treaty clauses of the United States Constitution. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974); *Cayuga Indian Nation v. Cuomo*, 565 F.Supp. 1297, 1317-1320 (N.D.N.Y. 1983).

III. The Decision Below Directly Conflicts With This Court's Policy of Permitting Relitigation Even After Merits, if the Earlier Suit's Procedures Are Questionable as to Quality, Extensiveness or Fairness, in Its *Kremer v. Chemical Const. Corp.* Decision.

Even assuming *Mashpee I* had reached merits (which petitioners of course deny), this Court will permit relitigation if the plaintiff can demonstrate serious defect in the way the earlier suit was handled:

> " 'Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of the procedures followed in the prior litigation.' " *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 481, 102 S.Ct. 1883, (1982), *quoting Montana v. United States*, 440 U.S. 147, 164 n.11 (1979).

Most certainly petitioners believe *Mashpee I* was chock full of procedural defect.

For example —

This Court long ago held 'standing' and 'tribal existence' are questions of law for the court. *Ross v. Bernhard*, *supra*; *Wilbur v. United States*, *supra*. Yet this fact was entirely overlooked by the Mashpees' then chief counsel when he permitted defendants' lead counsel, an experienced trial lawyer, to lead him into submitting 'tribal existence', a law question, to a lay jury:

> "MR. ST. CLAIR: . . .The fact there was a jury on this issue is an interesting fact. My memory is very clear, there was no objection to the jury, because, as I well

> remember, we had fully briefed that question and were somewhat surprised that there was no opposition to the claim of jury." *Recusal Hearing*, CA Nos. 81-3205-S through 81-3209-S, 2 February 1982, Tr. 57.

Because Judge Skinner allowed this procedural aberration, for the first time in 200 years of federal Indian law, a non-Indian lay jury passed on 'tribal existence', a most sophisticated question of law. So this leads petitioners to question the quality of their legal representation in *Mashpee I*.[2]

Insofar as Judge Skinner is concerned, a remark he made during *Mashpee I* in the presence of certain Mashpee Indians, plagued them then and plagues them now:

> "The ramifications are very strong here. To follow the law would be too harsh on the non-Indians living in Mashpee."

Because in petitioners' view, this remark disclosed a sympathy for non-Indians and a nonsensitivity for Indians, it prompted them to aggressively seek recusal in *Mashpee II*, for petitioners believe Judge Skinner's remark raises serious question of his fairness in both Mashpee cases.

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[2] The entire *Mashpee I* procedure has been seriously questioned in *Mashpee Revisited*, American Indian Journal, November 1980, p. 19, and in Clinton & Hotopp, supra. During the *Mashpee I* trial, Judge Skinner told the jury: "[A]s you perhaps gathered, 'tribe' is a fluid word having many different meanings to many different people; and ultimately, you'll have to work with a definition that I will have to give you, a prospect I look forward to with some intrepidation [sic]." *Mashpee I* Tr. 26-72, 23 November 1977. Both during and after the trial, the parties and the District Judge questioned the relevance of all the purported "relevant times" submitted to and passed on by the jury *except* 1976. *See Mashpee I*, 447 F.Supp. at 947-948. And in upholding the lower court, the First Circuit applied the rule that a jury verdict will be upheld if there is any view of the evidence supporting it. *Mashpee I*, 592 F.2d at 590. Application of this standard led to some pretty far-reaching speculation and surmise. And if there never should have been a jury, most of the *Mashpee I* appellate opinion is surplusage anyway because most of the opinion is devoted to trying to justify what the jury said and did.

IV. The Decisions Below Directly Conflict with this Court's Policy Allowing Those Not Involved in Earlier Litigation to Bring Their Own Actions and Litigate New or Even Identical Issues, in Its *Blonder-Tongue v. University Foundation* Decision.

As petitioners pointed out to the First Circuit, the district judge stated:

> "It is not clear . . . that the plaintiff in *Mashpee* [*I*], in the sense of those individuals who controlled the prosecution of the case, represented all of the plaintiffs here." *Mashpee II*, 542 F.Supp. at 801.

The legal effect of this finding is clear:

> "Some litigants — Those who never appeared in a prior action — may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position." *Blonder-Tongue Labs v. University Foundation*, 402 U.S. 313, 329 (1971).

Nevertheless, the First Circuit dismissed on res judicata without discussing either the trial court's finding or the *Blonder-Tongue* policy. Thus, the 334 individual Indian petitioners believe they were denied fundamental due process.

It is well-settled that the individual tribal Indian has a 'right of common' or 'right of user' in tribal assets derived from his tribe. *See United States v. Felter*, 546 F.Supp. 1002, 1022 (D.Utah 1982) and cases there cited. So *Mashpee II* petitioners sought their own declaration of tribal status as a foundation for declarations of their derivative rights. However, the lower courts refused to address any of petitioners' new bases for tribal standing.

Summary

Justice Holmes once observed, "Hard cases make bad law!" And petitioners cannot help but feel theirs is perceived as a hard case because of the unusual and summary disposition of *Mashpee II* so far. In fact a clue to First Circuit perception may lie in District Judge Skinner's observation during *Mashpee I*, "The ramifications are very strong here. To follow the law would be too harsh on the non-Indians living in Mashpee."

Yet petitioners are aware that Judges are not to be swayed by the "hardness" of a case. As Federal District Judge McCurn observed just this past May:

> "Tribal land claim litigation attracts considerable attention and apprehension among non-Indians, and not merely among those in the claim areas. This is understandable given the size and location of the claimed lands and the drastic nature of the remedy sought. Indeed, the prospect of the most drastic conceivable remedies is extremely disturbing, and has tended to pervade and disrupt the impartial determination of the issues raised on this motion to dismiss. *That it must not do.* It is the duty of the Court, at this juncture, to ascertain whether it has jurisdiction over the subject-matter and the parties, whether the claim is justiciable and timely, and whether the complaint states violation of Indian possessory rights. Those questions we must answer affirmatively. The Cayugas are therefore entitled to present evidence in support of their claim." *Cayuga Indian Nation v. Cuomo, supra,* 565 F.Supp. at 1329-1330 (emphasis added).

Petitioners are also aware they are wards of the Nation and hence of this Court, because the very weakness of their situation in so many cases has come about because of non-Indian avarice particularly as far as Indian land, fishing and hunting, timber, minerals and other tribal assets are concerned.

So petitioners believe no matter how much the non-Indian upset in Mashpee or elsewhere in Massachusetts, on well set-

tled procedural and substantive rules and policies of federal Indian law, at the very least they are entitled to the declaratory relief they seek. In fact, while their claim involves only 16,000 acres and all six Wampanoag tribal land claims in Massachusetts only total 24,000 acres, just across the border in New York, petitioners' Oneida brethren have a 6,000,000 acre claim working through the federal courts. Yet in response to a defense argument protesting the enormous potential upset of that claim, and in further contrast to Judge Skinner's attitude, Second Circuit Judge Mansfield responded:

> "Yet we know of no principle of law that would relate the availability of judicial relief inversely to the gravity of the wrong sought to be redressed. Rather, the courts have in numerous contexts treated as justiciable claims that resulted in wide-ranging and 'disruptive' remedies. [citing cases]." *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1083 (2nd Cir. 1982).

The simple fact is, despite the First Circuit's unsupported assertion that *title was fully litigated*, this core issue has never been reached, let alone litigated. Yet oddly enough, just 10 months after deciding *Mashpee I*, the First Circuit noted in a later Massachusetts Indian land claim:

> "The next year, 1789, the United States was formed and Massachusetts' sovereignty over the Indian lands ended." *Epps v. Andrus*, 611 F.2d 915, 916 (1st Cir. 1979), *citing Oneida Indian Nation v. County of Oneida*, *supra*, 414 U.S. 661.

So in that sense, were Mashpee tribal title ever litigated, by having admitted the United States has held sovereign title to the Mashpee Reservation, subject to the Mashpees' possessory rights, since 1789, the First Circuit has not only decided the tribal title issue correctly but in the Mashpees' favor.

But in their companion petition for certiorari, petitioners' Gay Head brethren challenge the First Circuit's recent asser-

tion of Massachusetts' right to extinguish Indian possessory title to Indian land within its borders through its general police powers and pre-Union fee title. And of course this proposition goes not only to the heart of the Gay Headers' claims but to the heart of all six Massachusetts Indian land claims including instant petitioners' claims.

In any event, petitioners feel no matter how hard their case, neither the First Circuit nor Judge Skinner are warranted in changing the rules after the game is played to defeat the Indians' claims no matter how. This Court has demonstrated time and again hard cases provide opportunities to show the integrity of our law. As Justice Black put it, "Great nations, like great men, should keep their word." *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960).

Conclusion

For the reasons stated above, a writ of certiorari should issue to review the First Circuit's decision.

Respectfully submitted,

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Appendix A

United States Court of Appeals
For the First Circuit

No. 82-1562

MASHPEE TRIBE, ET AL.
PLAINTIFFS-APPELLANTS

v.

JAMES G. WATT, ET AL.
DEFENDANTS-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[HON. WALTER JAY SKINNER, *U.S. District Judge*]

Before
BOWNES and BREYER, *Circuit Judges*,
and CAFFREY,* *District Judge*.

Robert C. Hahn, with whom *William A. Hahn*, and *Hahn & Matkov* were on brief, for appellants.

James D. St. Clair, P.C., with whom *William F. Lee*, and *David H. Erichsen, Donald R. Frederico, Hale and Dorr*, and *Morris Kirsner* were on brief, for appellee Town of Mashpee.

Thomas R. Kiley, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, *Paul R. Matthews*, Assistant Attorney General, were on brief, for appellee Commonwealth of Massachusetts.

May 23, 1983

* Of the District of Massachusetts, sitting by designation.

Per Curiam. We have examined the record in this case and the prior case, *Mashpee Tribe v. Town of Mashpee*, 447 F.Supp. 940, 950 (D.Mass. 1978), *aff'd sub nom. Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979), with care, and we have reached three conclusions. First, the decision in the prior case rested on the tribe's inability to prove an essential element of its substantive claim, its continued tribal identity; the dismissal order therefore was a judgment on the merits rather than a dismissal for lack of subject matter jurisdiction. Second, all claims in this case are either the same as, or logically dependent upon, the basic claim presented in the first case — namely, whether the Mashpee Tribe is legally entitled to its "tribal land" in and around Mashpee, Massachusetts. *See generally Epps v. Andrus*, 611 F.2d 915 (1st Cir. 1979); *Shulthis v. McDougal*, 170 F. 529, 533 (8th Cir. 1909), *appeal dismissed*, 225 U.S. 561 (1912); *United States v. Felter*, 546 F.Supp. 1002, 1022 (D. Utah 1982); F. Cohen, *Handbook of Federal Indian Law* 605-11 (1982 ed.). Third, this claim was fairly litigated in the first suit, and the interests of the tribe and its members were fully and fairly represented. *See, e.g., Hansberry v. Lee*, 311 U.S. 32 (1940); *Nathan v. Rowan*, 651 F.2d 1223 (6th Cir. 1981); *Haas v. Howard*, 597 F.2d 654, 657 n.2 (1st Cir. 1978).

Under these circumstances, this effort to relitigate the tribe's claim is barred by elementary principles of res judicata. *See Restatement (Second) of Judgments* §§ 19, 24-25, 41 (1982); 3 Bracton, *On the Laws and Customs of England* 351-52 (S. Thorne trans. 1977) (circa 1250). The addition of other defendants and parcels of land does not change the result, for title to all Mashpee land is what was, and what remains, at stake. *See Mendez v. Bowie*, 118 F.2d 435, 440 (1st Cir.), *cert. denied sub nom. Rios v. Bowie*, 314 U.S. 639 (1941); *Mertes v. Mertes*, 350 F.Supp. 472 (D. Del. 1972), *aff'd by order*, 411 U.S. 961 (1973); *Restatement (Second) of*

Judgments §§ 25, 43 comment c (1982). Indian land claims are not entitled to a special exemption from these principles. *See Arizona v. California*, 51 U.S.L.W. 4325, 4331 (U.S. Mar. 30, 1983) (dictum); *Heckman v. United States*, 224 U.S. 413, 445-46 (1912). Our examination of the trial record confirms our previous conclusion that the trial court was not biased; we deny the plaintiffs' second motion to disqualify the trial judge, as well as all remaining motions.

The judgment of the district court is affirmed. The petition for mandamus and all other motions are denied.

Adm. Office, U.S. Courts — Addison C. Getchell & Son, Inc.

APPENDIX B

United States District Court
District of Massachusetts

CIVIL ACTION
No. 81-3205-S

MASHPEE TRIBE, ET AL.,
PLAINTIFFS,

v.

JAMES G. WATT, ET AL.,
DEFENDANTS

MEMORANDUM AND ORDER

June 30, 1982

SKINNER, D.J.

Plaintiffs, on their own behalf and on behalf of the Mashpee tribe, bring this action to recover tribal lands allegedly conveyed by their ancestors in violation of the Constitution and federal statutes.[1] They allege that the United States Government, in failing to approve or prevent the conveyances, violated its trust responsibility to the Mashpee Indians, thereby depriving the plaintiffs of their property and the equal protection of the laws in violation of the Fifth Amendment. Plaintiffs also allege that the Commonwealth of Massachusetts, by authorizing the sales,[2] as well as the Town of Mashpee and certain county and local officials, by validating the sales, violated their rights under the Constitution, the In-

[1] For a detailed discussion of the history of these transactions, *see, Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 943-947 (D. MA. 1978).

[2] Allegedly by the passage of two statutes: (1) ch. 463, Acts of 1869, and (2) ch. 293, Acts of 1870.

dian Nonintercourse Act, 25 U.S.C. § 177 ("Nonintercourse Act"), and several other federal statutes. They seek declaratory and injunctive relief and damages.

Defendants Town of Mashpee, William C. Nye, John J. Bowes and Stephen Weekes, and the Commonwealth of Massachusetts have moved to dismiss plaintiffs' complaint under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. For the reasons which follow, defendants' motions are allowed.

1. *Res Judicata.*

Defendants' first ground for dismissal is that plaintiffs' claims are barred by the judgment in *Mashpee Tribe v. Town of Mashpee,* 447 F. Supp. 940 (D. MA. 1978), *aff'd sub nom., Mashpee Tribe v. New Seabury Corp.,* 592 F.2d 575 (1st Cir.), *cert. denied,* 444 U.S. 866 (1979) ("*Mashpee I*"). That suit was brought by the "Mashpee Tribe" of Indians against the owners of allegedly tribal land located in the Town of Mashpee. The alleged tribe sought recovery of that land on the ground that it had been purchased in violation of the Nonintercourse Act. *Id.* at 943. The only question reached was whether the plaintiff constituted a tribe entitled to the protections of the Act. *Id.* After 40 days of trial, the jury found that plaintiff was not such a tribe. *Id.* Accordingly, the case was purportedly "dismissed on the merits," because the plaintiff had "not . . . established its standing to bring suit as an Indian tribe." *Id.* at 950. After the jury returned its verdict, the plaintiff was given an opportunity to amend its complaint to state the claims of its individual members, but it chose not to do so. *Mashpee I,* Transcript, pp. 2-3 (January 26, 1978).

The instant suit is substantially the same as *Mashpee I.* The plaintiffs allege that they are members of the Mashpee Tribe, the same entity involved in *Mashpee I.* Many, but not all, of

the individual plaintiffs here took an active role in *Mashpee I*, helping to plan the strategy of the case and testifying at trial or in depositions. Some of the defendants named in this case are different from those in *Mashpee I*, but the same land is at issue and the same transactions are challenged. In addition, the same general relief is sought; return of the land to the plaintiffs. Defendants maintain that these similarities require that the instant case be barred by *res judicata*.

A. *Tribal claims.*

Plaintiffs' claims on behalf of the "Mashpee Tribe" are clearly barred by the decision in *Mashpee I*. Plaintiff there was given a full and fair opportunity to litigate the issue of tribal existence and it was an issue necessary to the outcome of the action. Since the jury held that the "Mashpee Tribe" did not exist at the relevant times, plaintiffs here are collaterally estopped from proceeding on behalf of the alleged tribe. *See, Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 n.5 (1979).

B. *Individual claims.*

Defendants also contend that plaintiffs' individual claims are barred. They maintain that *Mashpee I* was dismissed on the merits; that plaintiffs here were in privity with the plaintiff in *Mashpee I*; and that therefore plaintiffs are precluded "from relitigating issues that were or could have been raised in that action." *Federated Department Stores v. Moitie,* 452 U.S. 394, 398 (1981), including any individual claims.

Plaintiffs respond by arguing that *Mashpee I* was not a final judgment on the merits because the only issue addressed was that of standing. Since the jury found that no tribe existed, the alleged tribe had no standing to sue, and the court had no jurisdiction to reach the merits. As a result, plaintiffs contend that *Mashpee I* is no bar to the instant suit.

In order to analyze the standing question, the identity of the "tribe" recognized by and suing on behalf of its individual

members in *Mashpee I* has to be separated from the issue of whether that group constituted a "tribe" entitled to the protections of the Nonintercourse Act. The issue of standing focuses on the characteristics of the party bringing the suit and not upon the issues raised in the complaint. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). Whether a plaintiff has a legal interest entitled to protection goes to the merits, not to the question of standing. *Data Processing Service v. Camp*, 397 U.S. 150, 153 (1969).

In this case, the group which brought *Mashpee I* possessed the necessary characteristics to establish its standing to sue. It had "Article III" standing because: (1) the group "suffered some actual . . . injury" (loss of land); (2) "as a result of the putatively illegal conduct of the defendant[s]" (authorization and consummation of land purchases without federal permission); and (3) the injury is "redressable by the court" (divestiture of the land or similar relief). *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 50 USLW 4103, 4105 (Jan. 12. 1982). The alleged tribe also fell within the court-imposed "prudential" limits on standing because: (1) it was "assert[ing] [its] own legal rights" (to the "tribal" land); (2) it was not asking the court to adjudge "abstract questions of wide public significance" or "generalized grievances;" and (3) its complaint fell within "the zone of interests to be protected . . . by the statute . . . in question" (the Nonintercourse Act). *Id.* at 4106.

Because the plaintiff in *Mashpee I* had standing, and no other jurisdictional barriers were raised, the court was empowered to determine the merits of the claim. It was at this point that the issue of tribal status under the Nonintercourse Act arose. Since the jury found that the plaintiff was not a "tribe" under the Act, the case was dismissed.

Under Fed.R.Civ.P. 41(b), that dismissal operated "as an adjudication on the merits" unless it was "for lack of jurisdic-

tion". "Lack of jurisdiction" within the meaning of the rule covers "plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim," *Costello v. United States*, 365 U.S. 265, 285 (1961). These are technical preconditions to access to the court, not elements of the substantive claim, and are typically curable. *See*, e.g., *Costello, supra*, *Eaton v. Weaver*, 582 F.2d 1250, 1256 (10th Cir., 1978); *Truvillion v. King's Daughters Hospital*, 614 F.2d 520, 525 (5th Cir., 1980); *Smith v. Pittsburgh Gage and Supply Co.*, 464 F.2d 870 (3rd Cir., 1972).

Mashpee I was clearly not a case in that category and does not fall within the exception to the adjudication on the merits in Rule 41(b). Accordingly, I conclude that the judgment of dismissal in *Mashpee I* was a judgment on the merits. *Cf. Weston Funding Corporation v. Lafayette Towers, Inc.*, 550 F.2d 710 (2nd Cir., 1977).

The issue is whether the individual members of the Mashpee Tribe are now barred from bringing a suit in their own behalf. Where the plaintiff in a second suit was in privity with or in control of the plaintiff in the first suit, *res judicata* bars either one from relitigating all issues that were or could have been raised in the initial action. *See, generally*, 1B Moore's ¶0.411[1] at 1251-1254, *Federated Dept. Stores*, 452 U.S. at 398.

Under generalized notions of privity, plaintiffs could be bound on the theory that even though the Mashpee Tribe was not recognized under the Nonintercourse Act, it was an organization which effectively represented the interests of its individual members. *See, Lawlor v. National Screen Service*, 349 U.S. 322, 329 n.19 (1955) (privies are "those whose interests are represented by a party to the action"), *General Foods v. Mass. Dept. of Public Health*, 648 F.2d 784, 787 (1st

Cir., 1981) ("a person who is not a party to an action but who expressly or impliedly gives a party authority to represent him may be bound by the rule of *res judicata* as though he were a party"), *Acree v. Airline Pilots Association*, 390 F.2d 199, 202-203 (5th Cir., 1968), *cert. denied*, 393 U.S. 852 (1976) (class action by airlines pilots is barred where their individual claims were effectively raised in an earlier suit by their union). It is not clear, however, that the plaintiff in *Mashpee*, in the sense of those individuals who controlled the prosecution of the case, represented all of the plaintiffs here.

Furthermore, even if the technical requirements of *res judicata* have been met, its application may be stayed for competing reasons of public policy or fairness. *See*, 1B Moore's 0.405[11]-[12] at 783-791. In *Brown v. Felsen*, 442 U.S. 127 (1979), the Supreme Court noted that:

> Because *res judicata* may govern grounds and defenses not previously litigated, however, it blockades unexplored paths that may lead to truth. For the sake of repose, *res judicata* shields the fraud and the cheat as well as the honest person. It is therefore invoked only after careful inquiry.

Brown v. Felsen, 442 U.S. at 132. And, in *Blonder-Tongue v. University Foundation*, 402 U.S. 313 (1971), the Court noted that:

> Both orderliness and reasonable time saving . . . require that [res judicata be applied] unless some overriding consideration of fairness to a litigant dictates a different result in the circumstances of a particular case.

Blonder-Tongue, 402 U.S. 324-325.

Considerations of public policy and fairness have led courts to stay the application of *res judicata* in a number of different

situations, e.g., (1) where "neither the interests served by *res judicata*, the process of orderly adjudication in state courts, nor the policies of the Bankruptcy Act would be well served" by precluding the petitioner from presenting evidence beyond the earlier judgment in a later suit to determine whether a debt previously reduced to judgment is dischargeable under the Act, *Brown*, 442 U.S. at 133; (2) where the public's interest in giving close scrutiny to fee arrangements between attorney and client outweighs the policies behind *res judicata* and collateral estoppel, *Spilker v. Hankin*, 188 F.2d 35 (D.C. Cir., 1951); (3) where the public policy against monopolization prevents a patentee from conclusively establishing the validity of a patent for the purpose of obtaining injunctive relief, *Lawlor*, 349 U.S. at 326-329; (4) where giving strict *res judicata* effect to state administrative decisions would undermine considerations of federal preemption, *Town of Springfield, Vt. v. State*, 521 F. Supp. 243, 246 (D. Vt., 1981); and (5) where application of *res judicata* would enable employers to immunize themselves against enforcement of OSHA standards, a result contrary to the policies of the Act, *International Harvester Co. v. Occupational Safety and Health Review Commission*, 628 F.2d 982, 986 (7th Cir., 1980).

This action involves the rights of American Indians, a subject of special concern to the federal government. As one court has recently noted:

> It is federal policy, undeniable, if belated, that the Indian has a special status in our Country and that he is justly entitled to very special protection.

Red Fox v. Red Fox, 564 F.2d 361, 365 (9th Cir., 1977), *quoting*, *Aqua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184, 1188 (9th Cir., 1971) (Ely, J., dissenting), *cert. denied*, 405 U.S. 933 (1972). That special con-

cern may provide the basis for staying the effect of *res judicata* in particular cases. *See, id.*

The instant suit also presents, for the first time, the claims of the individual descendants of the Mashpee Tribe. It raises an issue under the Nonintercourse Act which has not been fully addressed by any court, an issue which will also be raised in several related cases now pending before me.[3]

Because the case involves the rights of American Indians and raises unresolved issues with regard to those rights, the strict application of *res judicata* to bar plaintiffs' individual claims should not be applied as a matter of public policy even though it might be otherwise applicable.[4] Accordingly, while plaintiffs' tribal claims are barred for the reasons stated previously, I will consider the legal merits of plaintiffs' individual claims.

2. *Plaintiffs' Individual Claims.*

A. *Nonintercourse Act.*

Plaintiffs allege that the state and local defendants violated the Nonintercourse Act, 25 U.S.C. § 177, by authorizing the

[3] *Christiantown Tribe, et al. v. Watt, et al.*, Civ. No. 81-3206-S; *Chappaquidick Tribe, et al. v. Watt, et al.*, Civ. No. 81-3207-S; *Herring Pond Tribe, et al. v. Watt, et al.*, Civ. No. 81-3208-S; *Troy Tribe, et al. v. Watt, et al.*, Civ. No. 81-3209-S.

[4] I am aware that the Supreme Court, in a recent case, *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401, 403 (1981) has cast a pall upon the "flexible" application of *res judicata*. I do not think that that case requires a different result here, however. First, the court did not expressly overrule other recent cases such as *Brown*, 442 U.S. 127 (1979), which had reaffirmed the flexibility of *res judicata* in certain cases. Second, *Federated Dept. Stores* involved the *res judicata* effect of a failure to appeal, a circumstance more directly implicating the public policy in favor of repose.

sale of their ancestral land without federal approval.[5] They maintain that even though they do not constitute a tribe under the Act, nor were they such a tribe at the time the challenged conveyances were made, *see, Mashpee I,* they are still entitled to the protections of the Act because of their status as individual Indians. Defendants contend that only sales of tribally held land, not land owned by individual Indians, are covered by the Act and that therefore only tribes can state a cause of action under its provisions.

Several cases have stated that while land transactions by individual Indians were subject to the restrictions of the Nonintercourse Act in its early versions,[6] that coverage was eliminated with the passage of the 1834 Act.[7] *See, Epps v. Andrus,* 611 F.2d 915, 917 (1st Cir., 1979), *Narrangansett Tribe*

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[5] The Nonintercourse Act provides:

> No purchase, grant, lease or other conveyance of lands,... from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. § 177.

[6] The first of the Nonintercourse Acts was enacted in 1790, Act of July 22, 1790, ch. 33, 1 Stat. 137 ("1790 Act"). Section 4 provided that: "no sale of lands made by any *Indians*, or any nation or tribe of Indians, shall be valid ..., unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." (emphasis added). That provision was reenacted in 1793, Act of March 1, 1793, ch. 19, 1 Stat. 329; 1796, Act of May 19, 1796, ch. 30, 1 Stat. 469; 1799, Act of March 3, 1799, ch. 46, 1 Stat. 743; and in 1802, Act of March 30, 1802, ch. 13, 2 Stat. 139 ("the 1802 Act"). Section 12 of the 1802 Act stated that: "no purchase, grant, lease, or other conveyance of lands, ..., from any *Indian*, or nation, or tribe of Indians" without federal approval was invalid. (emphasis added).

[7] In section 12 of the Act of June 30, 1834, ch. 161, 4 Stat. 729 ("the 1834 Act"), the reference to "any Indian" in the 1802 Act was eliminated, and the restriction on alienation of Indian land was enacted in substantially the form of 25 U.S.C. § 177.

v. Southern Rhode Island Land Dev. Corp., 418 F. Supp. 798, 808-809 (D. R.I., 1976), *Mohegan Tribe v. State of Connecticut*, 638 F.2d 612, 627 (2nd Cir., 1980), *cert. denied*, 452 U.S. 968 (1981), *see, generally*, Dwyer, *Land Claims Under the Indian Nonintercourse Act: 25 U.S.C. § 177*, 7 B.C. Env. Affs. L. Rev. 259, 271 (1979). Accordingly, it has been held that individual Indians may not state a claim under the Nonintercourse Act. *See, Epps*, 611 F.2d at 917-918.

These cases, however, did not consider the effect of § 29 of the 1834 Act on the continued existence of whatever individual rights there were under the previous Nonintercourse Act. Section 29 was a "saving clause". "[T]he Nonintercourse statute contained in the 1802 Act remained applicable by virtue of § 29 of the 1834 Act to the tribes east of the Mississippi." *Mohegan*, 638 F.2d at 626; *see also*, Note, *Land Claims Under the Indian Trade and Intercourse Acts: The White Settlement Exception Defense*, 60 B.U. L. Rev. 911 (1980). *Mohegan* held that § 29 continued the applicability of the "white settlements exception" of the 1802 Act to the eastern tribes, even after its elimination in the 1834 Act. 638 F.2d at 626-628. Plaintiffs argue that § 29 also preserved the language "from any Indian" in the 1834 Act and thereby established the basis for their cause of action.

Defendants assert to the contrary that the language of section 29, that the repeal of the 1802 Act by the 1834 Act "shall not . . . impair or affect the intercourse act of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi . . .", saves only tribal rights. The language may also be read, however, to mean that with respect to tribes east of the Mississippi, the rights of individual Indians would be preserved. This ambiguity requires me to explore the intent of Congress, never clear at best, now shrouded by a "veil of time" nearly two centuries thick.

The major purpose of the Nonintercourse Act was to prevent Indian uprisings and preserve the peace along the frontier. *Mohegan*, 638 F.2d at 621. This was to be accomplished two ways. One was by "protect[ing] the rights of Indians to their properties", *Wilson v. Omaha Indian Tribes*, 422 U.S. 653 (1979), by acknowledging and guaranteeing the Indian tribes' right to occupy their aboriginal lands ("aboriginal title"). *See Narragansett*, 418 F. Supp. at 803. The other was by preventing the Indians from "improvidently disposing of their lands" at fraudulently low prices. *Id.*, *see generally*, Note, *supra*, 60 B.U. L. Rev. at 918-919. This purpose would in no way be served by restricting the alienation of property acquired by Indians from non-Indians in settled sections of the country. It seems clear, therefore, that the Nonintercourse Acts imposed restrictions only on the alienation of land held under aboriginal title.

Aboriginal title, however, was always tribal, and held in common by the members of the tribe. Individual use and occupancy might be granted by consent, and indeed might be extended to one family or network of families from generation to generation, but such right of use and occupancy was not transferable, and title at all times remained in the tribe. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 665 (1979); *Joint Tribal Council of Passamaquoddy Tribes v. Morton*, 528 F.2d 370, 376 n.6 (1st Cir., 1975). As one recent commentator observed:

> Although the Act makes reference to individual Indians, the justification for allowing only Indian tribes to assert claims under the Act is warranted. This justification rests on the nature of the relationship between an individual Indian and his rights to tribal land. Indian land belonged to the tribe as a community, and the right of each

> individual to participate in the enjoyment of such property depended on tribal membership. This right was neither alienable nor descendable, and it did not entitle an individual to a pro rata proportion of the proceeds of any sales of the land made by the tribe. Thus the fact that no individual Indian can assert a cause of action under the Act is consistent with his rights to tribal land.

Comments, *Indian Land Claims under the Nonintercourse Act*, 44 Albany L. Rev. 110, 122 (1979).

The above description was in fact applicable to the Mashpee Indian community until 1842. *Mashpee I*, 447 F. Supp. at 946; Hutchins, *Mashpee, The Story of Cape Cod's Indian Town*, Amarta Press, 1979, pp. 118-119. In 1842, the General Court of Massachusetts granted to the Indian Proprietors of Mashpee a limited title to up to 60 acres of previously allotted common land of the proprietorship. This title was in all respects the equivalent of fee simple title except that the land could not be alienated to anyone except another Mashpee proprietor. *Id.* In 1869, the General Court released this restriction on alienation. By this time, some of the proprietors had sold their property to other proprietors, some of whom had acquired very large tracts of land.

Thus some Mashpee Indians did acquire individual title to land which had been held in aboriginal Indian title. Did Congress intend such land to be covered by the Nonintercourse Act of 1802?

Congress did in fact go through the same allotment process with other Indian tribes as the General Court of Massachusetts had with Mashpee, and in many of these cases had restricted the rights of individual Indians to alienate these holdings without the approval of the federal government. Such approval was provided for by administrative action, however, and not by "treaty or convention" approved by

Congress, and the restriction was limited in time to 21 or 25 years. Cohen, *Handbook of Federal Indian Law*, U.S. Government Printing Office, 1943, pp. 108-109, 206, 221-227.

While it thus appears that restriction of alienation on individual Indian lands for various periods of time was a policy of Congress as expressed in divers acts and treaties affecting Indian tribes, it does not follow that such an intent was expressed in the Nonintercourse Act for the following reasons:

First, the language "any Indians, or nation or tribe of Indians" was carried over into the 1802 Act through a succession of intervening statutes, from the first Nonintercourse Act, which was enacted July 22, 1790, 1 Stat. 137. It is unlikely that Congress was contemplating the sale of individual Indian allotments at this time. In 1790, the President and Congress were concerned with peace on the frontier and preventing the nation's relationship with large and powerful Indian tribes from dangerous deterioration as a result of the depredations of unscrupulous non-Indian settlers. It is not likely that they were troubled by rare sales of land held by individual Indians.[8]

Second, the scheme of regulations of allotted lands was tailored to dealings with individuals; e.g., permission to sell or mortgage was granted administratively; the restraint was limited in time and could be lifted if the Indian administrator was satisfied that the individual owner was capable of handling his own affairs. Cohen, *supra*, 109. Under the Nonintercourse Acts, the restraint on alienation could be released only by treaty or convention. Treaties and conventions are made by the President with the consent of the Senate. The terms are ordinarily applied to arrangement between sovereign

[8] For a general discussion of the purposes of the Act, *see*, F. Prucha, American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts 1790-1834 (1962).

powers, including Indian tribes. *See, Edye v. Robertson,* 112 U.S. 580, 598 (1884); *United States v. Wheeler,* 435 U.S. 313, 322-323 (1978). It seems highly unlikely that Congress intended to crank up the whole cumbersome treaty power of the United States every time an individual Indian undertook to mortgage or sell his section of allotted land. "Treaty or convention" is wholly inappropriate language to describe a nation's dealing with an individual.

What, then, is the meaning of "any Indian" in the phrase "any Indian, or nation, or tribe of Indians"? One commentator has suggested that "any Indian" was included to cover the common situation where rights to tribal land were granted by deed of a chief or of head men as representatives of the tribe. Note, *supra,* 60 B.U. L. Rev. 928. Such deeds figure prominently in Mashpee history, e.g., the grants by Paupmunnuck to Myles Standish and of Weepquish, Tookonchasun, and later Quachatasset to the Mashpee proprietors. Hutchins, *supra,* pp. 26, 47-51. This reading also provides an explanation for the dropping of the phrase without debate or comment in the 1834 Act: it was redundant.

It is noteworthy, although not conclusive, that even the 1802 Act did not include the phrase "any Indian" in that part of section 12 which provided punishment for negotiating the sale of Indian lands:

> . . .: and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty or convention, directly or indirectly, to treat with *any such Indian nation, or tribe of Indians,* for the title or purchase of any lands by them held or claimed, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months: . . . (emphasis supplied).

If the savings clause was not for the purpose of preserving a restriction on the alienation of individual Indian title, what

was its function? In *Mohegan, supra*, the Court of Appeals for the Second Circuit held that it preserved the "white settlement" exception with respect to eastern Indians. Since the trading provisions of the 1834 Nonintercourse Act applied only to "Indian Country",[9] however, the need to preserve that exception is far from clear. The most satisfactory explanation is that opponents of the administration's Indian policy, led by Senator Freylinghuysen of New Jersey, were concerned that the emphasis in the 1834 Act on "Indian Country", and the federal policy of forced relocation westward of the Indians, would leave tribes and remnants of tribes east of the Mississippi without federal protection.[10] *See*, Sen. Freylinghuysen, *Speech Delivered in the Senate of the United States*, Gales & Seaton's Register of Debates in Congress, Vol. 6, 21st Cong., 1st Sess., Friday, April 9, 1830, pp. 309-322. Section 29 of the 1834 Act, "the saving clause", was added to the Act by an amendment offered by Senator Freylinghuysen. *See*, H.R. Rep. No. 474, 23rd Cong., 1st Sess. 83; Congressional Debates, Vol. 10, part 4, 23rd Cong. (1833-1834) at 2125.

Accordingly, I conclude that section 29 of the Nonintercourse Act of 1834 did not preserve any federal restriction on

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[9] Section 1 of the 1834 Act defined "Indian Country" as

> all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished.

This definition has been interpreted to include any land, not within the borders of a state east of the Mississippi and to which Indian title has not been extinguished. *See, Bates v. Clark*, 95 U.S. 204, 207-208 (1877), *Mohegan*, 638 F.2d at 618.

[10] This interpretation of section 29 does not require, and I do not hold, that the provisions of the 1834 Act, in fact, only applied in "Indian Country". *Compare, Mohegan*, 638 F.2d at 626, and *Mohegan*, 452 U.S. 968, Rehnquist, J. (dissenting).

the alienation of land held by individual Indians because no such restriction existed in the 1802 Act.

I realize that dicta in *Epps v. Andrus, supra*, 611 F.2d at 917, *Narrangansett Tribe, supra*, 418 F. Supp. 808-809 and, in my own opinion, in *Mashpee I*, 447 F. Supp. at 950, suggest that there was such a federal restriction. This conclusion was not necessary to the result in any of those cases, and at least in *Mashpee I*, the issue was not explored. In my opinion, these dicta are incorrect.

The ultimate conclusion in *Epps v. Andrus*, however, that only Indian tribes or nations of Indians may invoke the protection of the Nonintercourse Act is correct for the reasons stated above. The issue of tribal status having been resolved against the plaintiffs in *Mashpee I*, their claims as individuals under the Nonintercourse Acts must be dismissed.

B. *Other Claims.*

In addition to their claims under the Nonintercourse Act, plaintiffs allege violations of several constitutional and statutory provisions:

(1) Plaintiffs allege that the Commonwealth's and the town's actions in authorizing the sale of their ancestral lands violated the Commerce Clause, U.S. Constitution, Article I, § 8, cl. 3. The Commerce Clause provides that Congress shall have the power to "regulate commerce . . . with the Indian Tribes". *Id.* It has been held to apply two limitations on the states' authority to regulate Indian affairs. One is federal preemption. *See McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973). Since there is no federal statute which protects plaintiffs here, preemption is not applicable. The other limitation is based on inherent Indian sovereignty. *See, id.;* Laurence, *The Indian Commerce Clause*, 23 Ariz. L.

Rev. 203, 242 (1981). To the extent this limitation is available, however, it applies to state interference with tribal self-government. *Id.* Since plaintiffs do not constitute a tribe, it too is inapplicable.

(2) Plaintiffs also allege that the state defendants' actions violated the Supremacy Clause, U.S. Constitution, Article IV, cl. 2. The Supremacy Clause does not support direct causes of action, however. It only gives priority to federal rights created by a federal statute when they conflict with state law. *See, Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979). Since plaintiffs have not shown the acts of the state to be in conflict with any federal laws affecting them as individuals, the Supremacy Clause does not apply.

(3) Plaintiffs allege that all the defendants violated their rights under the due process and equal protection guarantees of the Constitution by failing to accord them their rights secured by the Nonintercourse Act. Since I have already held that they are not protected by the Act, these claims must fall as well.

(4) A similar result is reached for plaintiffs' claims under 42 U.S.C. § 1983, 25 U.S.C. § 1322(b), and 28 U.S.C. § 1360 (b).[11] Since plaintiffs have shown no violation of federal law and no trust relationship or other restriction upon the alienation of the claimed land, they have no cause of action under these statutes.

(5) Nor have plaintiffs stated claims under the National Environmental Policy Act, 42 U.S.C. §§ 4331-4335, or the laws governing the conservation of historic sites and archeo-

[11] Sections 25 U.S.C. 1322(b) and 28 U.S.C. 1360(b) both provide that:

> Nothing in this section shall authorize the alienation ... of any real ... property ... belonging to any Indian ... that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States...

logical resources, 16 U.S.C. §§ 461-470n, 470aa-47011. These statutes do not provide for any causes of action applicable to the actions challenged by plaintiffs.

Since plaintiffs have failed to state any claim upon which relief may be granted, defendants' motions must be ALLOWED as to all counts. Accordingly, plaintiffs' complaint is DISMISSED with respect to defendants' Town of Mashpee, William C. Nye, John J. Bowes, Stephen Weekes, and the Commonwealth of Massachusetts.

[SIGNED]

United States District Judge

Appendix C

List of Parties

MASHPEE TRIBE and MASHPEE INDIAN RESERVATION and EARL H. MILLS, SR., CHIEF, ELLSWORTH OAKLEY, DELSCENA HENDRICKS, JOHN A. PETERS, RUSSELL M. PETERS, AMELIA G. BINGHAM, WILLIAM PETERS, JOHN PETERS, JR., MAY L. LOPES, EARL H. MILLS, JR., GKISEDTANAMOOGK, DAISY MOORE, ANITA NIELSEN, CLINTON ATTAQUIN HAYNES, JOHN NEWCOMB, JOHN MENDES, CAROL LOPEZ, LEO G. PETERS, EDGAR F. TOBEY, SR., FREDERICK POCKNETT, CLARENCE MORAN, VIRGINIA MORAN, OLIVER POCKNETT, LAURA MENDES, LYDIA STANLEY, MICHELE TURPIN, JOAN AVANT TAVARES, WALTER M. FRYE, HERBERT NOYES, NORMAN DIAS, ROXANNE MILLS-BROWN, PAULA D. PETERS, LAWRENCE S. TOBEY, SR., LAWRENCE S. TOBEY, JR., GEORGE T. TOBEY, NATHANIEL J. TOBEY, MALCOLM G. TOBEY, MALCOLM TOBEY, JR., EARL N. CASH, LEONA A. WHITE, SOPHIA E. LOPES, RHODA M. FERNANDEZ, SILAS A. NEWCOMB, JR., GERTRUDE AIKENS, PHILIP ALMEIDA, ERIC ALMEIDA, VICTOR ALMEIDA, SANDRA ALVES, SHIRLEY PELLS BULLOCK, CLARENCE BULLOCK, RENEE HENDRICKS BANKS, MILDRED BLACK, OGDEN BLACK, MARLENE E. BLACK, CAROL S. BROWN, FREDERICK V. BROWN, BETTY BICKFORD, DOROTHY CASH, EARL N. CASH, JR., BERNARD COOMBS, ANITA COOMBS,

CINDY COSTA, NATALIE COSTA, ANEBA COSTA, VICKIE COSTA, DENISE COSTA, LINDA COSTA, JUANITA COSTA, MARGARET L. COSTA, JOHN OAKLEY, IRVING OAKLEY, MINNIE L. DEGRASSE, CHRISTINE OAKLEY FLOYD, MARSHA HELME, SHIRLEY HELME, MARJORIE DUARTE, TARLTON A. EDWARDS, RITA GONSALVES, PETER GONSALVES III, DION WESLEY FLOYD, RICHARD FLOYD, LINCOLN HENDRICKS, MYRON HENDRICKS, TEDDY W. HENDRICKS, WINONA HENDRICKS, CURTIS L. HENDRICKS, DOROTHY BORDLEY GASKINNS, MILTEER H. HENDRICKS, MILTON HENDRICKS, CHARLOTTE GRACE, LAWRENCE HENDRICKS III, SHELDON HENDRICKS, LISA HENDRICKS, KAREN LOPES, MABEL HENDRICKS, DONALD PETERS, LAWRENCE HENDRICKS, JR., THURALD HENDRICKS, JUNE HENDRICKS, JUDITH M. HENDRICKS, CHRISTINE HENDRICKS, PETER F. HENDRICKS, JANET HENDRICKS, KEVIN HICKS, BRICE HICKS, GERALDINE HICKS, VELMA HICKS, DELSCENA HICKS, BERTHA HICKS, ADELINE TRACY HICKS, WARREN M. HICKS, LISA B. HICKS, GARY HICKS, DONALD HICKS III, ADELINE B. HICKS, AMANDA HICKS, WARREN HICKS, JR., DONALD L. HICKS, LORETTA WHITE JONES, SHARON KENNEDY, BRAD LOPES, DEBRA LOPES, VINCENT LOPEZ, MARY LOPEZ, MARCIA LOPEZ, MARC LOPEZ, RITA LOPEZ, MARIE LOPEZ, ROBERT LOPEZ, ALICE LOPEZ, CARL MILLS, DELORES MILLS, RHONDA MILLS, RODNEY MILLS, CARLETTE MILLS, BRADFORD V. NORMAN, GERALD OAKLEY, WILBUR OAKLEY, RICHARD

OAKLEY, DONNA OAKLEY, KINO OAKLEY, FRANKLIN OAKLEY, LOIS OAKLEY, MAURICE OAKLEY, CATHERINE PERRY, NADINE PETERS, NEOTA PETERS, DARLINE PETERS, BERNADINE POCKNETT, ELSIE POCKNETT, DOUGLAS POCKNETT, VERNON POCKNETT, DONNELLA J. POCKNETT, WILLARD POCKNETT, VERNON M. POCKNETT II, LANSING POCKNETT, ELLEN FRYE SHARPE, CAROLINE OAKLEY, JUNE TIEXEIRA, CARMEN TUBBS, SEAMAN TURNER, SEAMAN TURNER II, RONALD TURNER, PATRICIA TURNER, HARRIET TURNER, CAROLYN J. TURNER, EDWIN WHITE, MARYANN HENDRICKS, TEDDY JOHN HENDRICKS, JULIUS TOBEY, VIOLA TOBEY, BETTY ANN BICKFORD, TRACY KUTCHEREA, PEARL TOBEY, MALCOLM TOBEY, NANCY TOBEY, ALTON TOBEY, ALCOTT TOBEY, YVONNE TOBEY, ROBIN TOBEY, ALTON TOBEY, ALTON TOBEY, JR., KEVIN TOBEY, DOROTHY PELLS, JANET PELLS, LINDA PELLS, LYDIA PELLS, SHIRLEY PELLS, HAROLD QUAN TOBEY, CLAUDE BAPTISTE, SQUANTO OAKLEY, JAMES CASH, PAUL R. HENDRICKS, BARBARA HENDRICKS, NINA LOPES, EVERETT TOBEY, HELEN ASHLEY, GARY COUETT, TERRY COUETT, CAROLINE OAKLEY, ALDEN LOPEZ, BESSIE TOBEY FRENCH, PETER FRENCH, LAVERNE FRENCH, CHARLENE FRENCH, CLAYTON CARLTON HENDRICKS, ELLEN M. HENDRICKS, HENDRICKS, MELISSA MELENDES, BETSEY HENDRICKS, BEATRICE JACKSON, LAVERNE JACKSON, ELEANOR JACKSON, WAYNE JACKSON, ROSALIE JACKSON, DIANNE JACKSON, ELMER W. HENDRICKS, STACY PETERS, KENNETH

TOBEY, LAWRENCE S. TOBEY III, EUGENE TOBEY, JR., BRYAN TOBEY, HAROLD TOBEY, NANCY OAKLEY, RUTH TOBEY WILLIAMS, VIOLET ORTIZ, ALMA SOUZA, MERTLE RIBEIRO, ROBERT HELME, GEORGE HELM, FLOYD HELM, RUSSELL HELME, BLANCHE DEAN, NORMA PETERS, DOROTHY INGE, QUAN TOBEY, SANDRA BELT, EUGENE BELT, KEVIN BELT, ERNESTINE BENSON, JUANITO BROWN, SONJA CARRINGTON, GINA M. CARRINGTON, LEE CARRINGTON, JR., CORRINE FERNANDES, BRENDA FERNANDES, DIANE JACKLIN FRIET, DOROTHY GREENE, ALFRED GREENE III, JOYCE GREENE, ALCOTT HAMMOND, LOUISE JACKLIN, PEARL LIMA, GEORGIANNA PELLS, DEANNA PRIDE, BELINDA PRIDE, MIRIAM ROCKET, ALICE SANTOS, ROBERT SANTOS, MELODY SANTOS, ALBERT SANTOS, WALTER SANTOS, JOSEPH SANTOS, SELENA THAYER, BONNIE THAYER, THELMA THAYER, CHARLES THAYER, JR., BILLY THAYER, CATHERINE THAYER, WILHELMINA TOBEY, ERNEST TOBEY, ERNEST TOBEY, JR., KEVIN TOBEY, ERIC TOBEY, COURTNEY TOBEY, ROLAND TOBEY, PAUL TOBEY, ROBERT J. TOBEY, BONNIE TOBEY, KATHY TOBEY, ERNESTINE TOBEY, THORNTON TOBEY, THORNTON TOBEY II, PAMELA TOBEY, DEBBIE TOBEY, ELIZABETH TOBEY, AARON TOBEY, JEAN TOBEY, MARC TOBEY, KAREN TOBEY, AARON TOBEY, JR., MARC TOBEY, GERTRUDE COOMBS TROTMAN, LINDAY COOMBS TROTMAN, TIMOTHY COOMBS TROTMAN, NELSON COOMBS TROTMAN, MARYLYN VIEGA, ERDINE WILLIAMS, DEBRA DEBARROS, CECILIA GOMES, VANESSA MENDES, NORENE MIRANDA, MICHELLE MIRANDA,

CECELIA TOBEY, EDGAR F. TOBEY, JR., ELLERY TOBEY, MARTY TOBEY, LAURA TOBEY, STEPHANIE TOBEY, GENEVIEVE LAMMERS, EDITH LAMMERS, JAMES LAMMERS, HARVEY LAMMERS, DAVID LAMMERS, EARL LAMMERS, PEARL WIXON LAMMERS, INEZ MILLS, RICHARD MILLS, GEORGE T. TOBEY, JR., GREGORY TOBEY, GINA TOBEY, GAY TOBEY, SHIRLEY MILLS, NICOLE TOBEY, JYL TOBEY, GLENNA COOMBS, ROGER TOBEY, GUSTAVUS COUETT, AURELIA COOMBS, SILAS NEWCOMB, BONITA COOMBS, ROBERT TOBEY, LAURA MARDENBRO, THOMAS HENDRICKS

PLAINTIFFS

v.

JAMES G. WATT, WILLIAM WELD, WILLIAM I. RANDALL, MARILYN M. SULLIVAN, JOHN E. FENTON, JR., SHIRLEY LEWIS, JOHN V. HARVEY, JOHN J. BOWES, STEPHEN WEEKES, WILLIAM C. NYE, COMMONWEALTH OF MASSACHUSETTS, TOWN OF MASHPEE

DEFENDANTS

Appendix D

(Separate Submission at Filing)

1. Complaint
2. Federal Answer
3. Morse Report
4. McKenney Report
5. Congressional Report
6. Schoolcraft Report
7. Earle Report